

Honorable Richard A. Jones

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

SCOTT KELLER and MARNIE KELLER, ,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.,

Defendant.

NO. 2:14-CV-00422-RAJ

**FIRST AMENDED COMPLAINT FOR
DAMAGES AND INJUNCTIVE
RELIEF**

I. INTRODUCTION

1. Plaintiffs SCOTT and MARNIE KELLER (“Plaintiffs” or “Kellers”) bring this action against WELLS FARGO BANK, N.A. (“Defendant” or “Wells Fargo”) for damages and injunctive relief. Plaintiffs allege that Defendant failed to timely disburse funds from their escrow account to pay their yearly hazard insurance premiums causing their insurance to lapse.

II. PARTIES

2. Plaintiffs. Plaintiffs Scott and Marnie Keller are residents of Bellingham, Washington.

1 10. Defendant specifically agreed through its contract with Plaintiffs to disburse the
2 annual insurance payments from the Plaintiffs' escrow account. The annual premiums consisted
3 of the following amounts:

4 2004: \$444.00
5 2005: \$486.00
6 2006: \$464.00 (partial year payment due to failure of Defendant to timely
7 pay the premium, but the policy was reinstated.)
8 2007: \$611.00
 2008: \$688.00
 2009: \$726.00

9 11. At all times since the inception of the loan, the Plaintiffs maintained an escrow
10 balance sufficient to pay the hazard insurance and property taxes. Beginning in 2006, however,
11 the Plaintiffs started to receive notices from Mutual of Enumclaw that their home insurance
12 premiums had not been paid. When the Plaintiffs received these notices, they contacted
13 Defendant, informed Defendant that the premiums had not been paid, and demanded that
14 Defendant pay the premiums. Until the annual period commencing on October 29, 2010,
15 Defendant paid the premiums, but as a result of Defendant's failure to timely disburse the
16 premium amounts from the Plaintiffs' escrow account, Mutual of Enumclaw increased the
17 Plaintiffs' yearly premiums.
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19 12. On information and belief, Defendant failed to disburse funds from the Plaintiffs'
20 escrow account to pay the Plaintiffs' property insurance for the annual period commencing
21 October 29, 2010 and ending October 29, 2011. Defendant failed to make this payment despite
22 the Plaintiffs' consistent timely payments of all amounts due under their mortgage with
23 Defendant, including a portion of their payment deposited into their insurance escrow account.
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1 13. In January, 2011, the Plaintiffs received a letter from Defendant informing them that
2 their hazard insurance had been cancelled and that Defendant had purchased forced-place
3 insurance effective October 29, 2010.

4 14. The letter informed the Plaintiffs that as a result of their increased hazard insurance
5 premium the Plaintiffs' monthly mortgage payments would increase to include the cost of the new
6 policy. As a result of Defendant's conduct, the Plaintiffs' monthly mortgage payment increased
7 to \$1,859.37 from their previous monthly payment amount of \$1,149.59.

8 15. After they received the letter, the Plaintiffs contacted Defendant numerous times to
9 ask why Defendant had failed to disburse funds from escrow to pay the premium on the Mutual of
10 Enumclaw policy and to dispute their increased mortgage payment. Defendant failed to explain
11 why the insurance had been allowed to lapse.

12 16. The Plaintiffs were repeatedly informed by Defendant that Defendant could see that
13 a mistake was made and that it would be corrected.

14 17. The Plaintiffs continued to pay their original monthly mortgage payment of
15 \$1,149.59, believing that Defendant would rectify its own error, as promised.

16 18. Upon information and belief, Defendant Bank placed the Plaintiffs' payments in a
17 suspense account and only applied payments when a full \$1,859.37 was received. This resulted
18 in what appeared to be a defaulted loan.

19 19. On May 1, 2013, Defendant stopped accepting the Plaintiffs' monthly mortgage
20 payments.

21 20. On or around August 5, 2013, Northwest Trustee Services, Inc. mailed the Plaintiffs
22 a Notice of Default, informing them that Defendant had declared them in default on their
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1 mortgage obligation for failure to make payments. The notice alleged that the Plaintiffs'
2 arrearage amounted to \$9,728.25.

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4 **V. FIRST CAUSE OF ACTION**

5 **VIOLATION OF REAL ESTATE SETTLEMENT PROCEEDURES ACT, 12 U.S.C**
6 **§2605(g)**

7 21. Plaintiffs re-allege and incorporate by reference the allegations in the preceding
8 paragraphs.

9 22. Defendant is a federally-insured depository lender.

10 23. The loan from Defendant to the Plaintiffs was a “federally regulated mortgage
11 loan” as said term is defined under 12 U.S.C. §2602(1).

12 24. Defendant has been the servicer of the loan since its inception.

13 25. The loan agreement between Defendant and the Plaintiffs required payment by
14 the Plaintiffs into an escrow account.

15 26. Defendant was required to make payments out of the escrow on behalf of the
16 Plaintiffs to maintain their hazard insurance.

17 27. At the time the hazard insurance premium was due, the Plaintiffs were not
18 delinquent in making mortgage payments.

19 28. Defendant has violated RESPA, 12 U.S.C §2605(g), by failing to make payments
20 from an escrow account for insurance premiums “in a timely manner as such payments become
21 due.”

22 29. Defendant has engaged in a pattern and practice of improperly overseeing and
23 monitoring the disbursement of escrow payments thereby causing the failure to make timely
24 payments of borrowers’ escrow items.

1 30. As a direct result of Defendant's RESPA violation, Plaintiffs have suffered actual
2 damages including, but not limited to the following:

- 3 a) The cost of an increased deductible for replacement insurance coverage;
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5 b) The loss of time expended by Plaintiffs in locating and securing replacement
6 coverage;
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8 c) The loss of time expended by Plaintiffs in repeatedly contacting Defendant in
9 attempts to correct this failure;
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11 d) Mental pain and suffering, mental anguish, aggravation, inconvenience, and
12 humiliation;
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14 e) The cost of driving to and from Plaintiffs' home in Bellingham to their
15 attorneys' office in Seattle;
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17 f) The decrease of Plaintiffs' credit score by the negative reporting by Defendant;
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19 g) Additional late fees, interest, foreclosure costs

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22 **VI. SECOND CAUSE OF ACTION**

23 **BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

24 31. Plaintiffs re-allege and incorporate by reference the allegations in the preceding
25 paragraphs.

26 32. Defendant owed Plaintiffs a duty of good faith and fair dealing by virtue of
27 Defendant's contractual relationship with Plaintiffs.

28 33. Defendant breached the covenant of good faith and fair dealing when they failed to
disburse from Plaintiffs' escrow accounts the funds set aside to pay the premiums on Plaintiffs
existing insurance policies.

1 34. As a direct result of Defendants' breach of the implied covenant of good faith and
2 fair dealing, Plaintiffs have suffered damages in the form of increased insurance premiums,
3 escrow charges, interest payments, and/or other charges.

4 35. Plaintiffs are entitled to recover their damages resulting from the foregoing breaches
5 of the implied covenant of good faith and fair dealing.

6 36. Plaintiffs are further entitled to any relief deemed appropriate by this Court,
7 including attorneys' fees and costs.

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9 **VII. THIRD CAUSE OF ACTION**

10 **BREACH OF FIDUCIARY DUTY**

11 37. Plaintiffs re-allege and incorporate by reference the allegations in the preceding
12 paragraphs.

13 38. Defendant holds funds in escrow on behalf of borrowers whose mortgages they
14 service. As such, Defendant owed to Plaintiffs duties of loyalty, trust and confidence, duties of
15 good faith to act with reasonable care and exercise prudence, and duties to act in their best
16 interest.

17 39. Defendant owed Plaintiffs a duty to timely disburse escrow funds to pay insurance
18 premiums when due. It is and was Defendant's responsibility to manage Plaintiffs escrow funds,
19 withdraw the funds to make the payments, and to assure that there are adequate funds in the
20 escrow to make the required payments.

21 40. As alleged herein Defendant breached their fiduciary duty to Plaintiffs by failing to
22 pay Plaintiffs' required premiums for hazard insurance. Defendants further breached their
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1 fiduciary duty to Plaintiffs by failing to make the payments after Plaintiffs brought the issue to
2 Defendant's attention.

3 41. As a direct result of Defendant's actions, Plaintiffs have suffered injury in the form
4 of unnecessary and inflated escrow charges, a loss of funds from their escrow accounts,
5 unnecessary late fees, and a pending foreclosure.
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7 42. Plaintiffs are entitled to punitive damages because Defendant acted in bad faith in
8 deliberate or reckless disregard of their rights and Defendant's obligation to hold Plaintiffs
9 escrow funds in trust.

10 **VIII. FOURTH CAUSE OF ACTION**

11 **NEGLIGENCE**

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13 43. Defendant owed Plaintiffs a duty of care in the management of their escrow account,
14 including making timely payments for their hazard insurance premiums.

15 44. Defendant breached this duty when it failed to disburse escrow funds timely for the
16 payment of Plaintiffs' insurance premiums.

17 45. The potential harm from Defendant's actions were readily foreseeable: If Plaintiffs'
18 insurance premiums were not paid, their insurance would lapse and their home would be
19 uninsured.
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21 46. Defendant's actions were the proximate cause of Plaintiffs' harm.

22 47. Plaintiffs' have sustained damages, including loss of credit rating, emotional
23 distress, time lost trying to rectify the error, and increased rate of insurance premiums.
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25 **X. FIFTH CAUSE OF ACTION**

26 **VIOLATION OF THE WASHINGTON STATE CONSUMER PROTECTION ACT** 27 **(Unfair and Deceptive Business Practices, RCW 19.86 et seq.)**

1 48. Plaintiffs re-allege and incorporate by reference the allegations in the preceding
2 paragraphs.

3 49. Defendant is a mortgage servicer and as such, is responsible for the day-to-day
4 management of the mortgage loan accounts of thousands of Washington homeowners. Defendant
5 conducts “trade” and “commerce” within the meaning of the Washington Consumer Protection
6 Act, RCW 19.86.010(2).

7
8 50. Plaintiffs are “persons” within the meaning of the Washington Consumer Protection
9 Act, RCW 19.86.010(1).

10 51. Defendant engaged in unfair and deceptive acts or practices by failing to disburse
11 funds from Plaintiffs escrow accounts to pay the premiums on required hazard insurance thereby
12 allowing the policies to lapse.

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14 52. Defendant engaged in unfair and deceptive acts and practices by failing to correct
15 Plaintiffs’ account thereby causing Plaintiffs’ account to appear to be in default.

16 53. Defendant engaged in unfair and deceptive acts and practices by refusing to accept
17 Plaintiffs’ monthly mortgage payments even though it knew it erred in failing to pay the
18 insurance.

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20 54. Defendant’s deceptive acts or practices have the capacity deceiving a substantial
21 portion of the public. In addition, the acts and practices outlined above are unfair because these
22 acts or practices (1) have caused substantial financial injury to Plaintiffs; (2) are not outweighed
23 by any countervailing benefits to consumers or competitors; and (3) are not reasonably avoidable
24 by consumers.

1 55. These acts and practices listed above are unfair because these acts and practices are
2 immoral, unethical, oppressive, and/or unscrupulous.

3 56. Defendant's actions affect the public interest. Defendant's general course of
4 conduct as alleged is injurious to the public interest. Moreover, this conduct is ongoing and/or
5 has a substantial likelihood of being repeated. Upon information and belief, Defendant manages
6 and/or oversees escrow accounts funded by thousands of Washington homeowners, and it is likely
7 that similar breaches are/have been perpetrated on other consumers.

8 57. As a direct and proximate result of Defendant's deceptive acts or practices,
9 Plaintiffs suffered injury. Plaintiffs' injuries included, but are not limited to, lost money, negative
10 implications on their credit, the non-current status of their home mortgage loan, the referral of
11 their home mortgage loan to foreclosure proceedings, and emotional damages connected to the
12 fear of losing their home.

13 58. Plaintiffs are therefore entitled to an order enjoining the conduct complained of
14 herein; actual damages; treble damages pursuant to RCW 19.86.090; costs of suit, including a
15 reasonable attorney's fee; and such further relief as the Court may deem proper.

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19 **XI. PRAYER FOR RELIEF**

20 WHEREFORE, Plaintiffs pray for the following relief:

21 A. An award to Plaintiffs of actual, compensatory, exemplary and statutory damages,
22 including interest, in amounts to be proven at trial;

23 B. That the Court grant injunctive relief against Defendant, prohibiting the foreclosure
24 of Plaintiff's residence by any entity or person until further order of this Court;

1 C. An award of attorneys' fees and costs, as allowed by law, including but not limited
2 to attorneys' fees and costs pursuant to RCW 19.86.090 and under the common fund doctrine;

3 D. An award of treble damages for each and every violation of the Consumer
4 Protection Act, plus attorney's fees and costs;

5 E. An award of pre-judgment and post-judgment interest, as provided by law;

6 F. Leave to amend the Complaint to conform to the evidence presented at trial; and

7 G. Such other or further relief as the Court deems just and proper.
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9
10 RESPECTFULLY SUBMITTED AND DATED this 10th day of December, 2014.

11 NORTHWEST CONSUMER LAW CENTER

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CERTIFICATE OF SERVICE

I hereby certify that on the date given below, I electronically filed the foregoing Plaintiff's FIRST AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF with the Clerk of the Court using the CM/ECF system which will send electronic notification of such filing to the following persons:

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DATED this 10th day of December, 2014, at Seattle, Washington.

/s/Adria Vondra
Adria Vondra